

# standards

A GUIDE TO AVOIDING RISKS FOR PROFESSIONALS

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## Michigan Supreme Court Deciphers Claims Against Nursing Homes, Distinguishing Ordinary Negligence From Medical Malpractice

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The Michigan Supreme Court issued an opinion on July 30, 2004 revisiting the issue of what claims constitute medical malpractice versus ordinary negligence. In the opinion of *Bryant v Oak Pointe Villa Nursing Center*, Docket No. 121723, 121724, the court determined that claims against a nursing home of failure to train staff and failure to inspect, comprise medical malpractice actions, whereas the claim that the nursing home defendant failed to take action after staff notified supervisors of plaintiff's decedent's propensity for becoming entangled in her bedding, sounded in ordinary negligence. The court further held that plaintiff's claim of a failure to maintain an "accident-free environment" is a claim of strict liability, rather than medical malpractice or ordinary negligence, and is not legally recognized in the State of Michigan.

The difference between a determination of medical malpractice or ordinary negligence dictates whether expert testimony is necessary to determine if actions or inactions comply with the applicable standard of care. Specifically, medical malpractice claims have specific statutory requirements including the filing of a Notice of Intent 182 days prior to filing a complaint, having an Affidavit of Merit signed by an expert accompanying the complaint, and having expert testimony to establish the standard of care.

For ordinary negligence claims, it is deemed that the determination of whether or not the defendant was negligent is within the realm of knowledge of an average juror and accordingly, no expert testimony is needed. Further, there are different statute of limitations or time requirements for filing a complaint, depending on the type of negligence alleged.

The Bryant court relied heavily upon *Dorris v Detroit Osteopathic Hospital Corp.* and *Adkins v Annapolis Hospital* in determining what is medical judgment and what is ordinary negligence. In this case, the plaintiff's decedent was an elderly woman who had

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Michigan continues to apply the *Dorris* standard in determining whether claims allege medical malpractice or ordinary negligence. Generally, failure to train and failure to inspect claims are medical malpractice cases, whereas a failure to take corrective measures when recognizing a risk of injury is deemed ordinary negligence. This standard may also be applied in assessing wandering cases, falls down open stairways, falls in general, lack of supervision, etc. It is nearly always preferable to have a case deemed a medical malpractice case so as to benefit from the guidelines and safeguards of the tort reform statutes.

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sustained several strokes and was totally dependent on caregivers. She died after slipping between the rails of her bed when her neck became wedged in the gap between the rail and the mattress. The death certificate indicated that she died from positional asphyxia.

The nursing assistants testified that the day prior to this incident, they had notified their supervisor that the decedent was tangled in her restraining vest, gown and bed sheets and that the bed wedges utilized to prevent her from entangling herself in the rails were not working. The court held that plaintiff's claims against the nursing home for failing to train the staff in assessing for risks of potential asphyxia, and the claim that they negligently failed to inspect the bed, frame and mattress to eliminate the risk of potential asphyxia, sounded in medical malpractice and required expert testimony. In other words, both the plaintiff and defendant would be required to retain experts who could testify and explain to the jury how the staff should have been trained to assess and inspect to minimize or eliminate the risk of asphyxia.

No expert testimony was deemed necessary to determine whether or not the staff and specifically, the supervisor should have intervened and taken some measure when notified of plaintiff's decedent becoming entangled in the bed clothes the day prior to her sustaining fatal asphyxiation. Accordingly, the jury would be allowed to make a decision as to whether or not some action should have been taken upon notification of this risk and whether the nursing home and its staff were negligent in failing to take some corrective action. Since the jury did not have to determine if the action taken was appropriate as no action was taken, no expert assistance was needed.

This court also addressed procedural issues involving the trial court which caused an inappropriate dismissal of Plaintiff's complaint because the judge ruled erroneously on the ordinary negligence/medical malpractice standards.

The *Bryant* decision provides further guidance to all health care professionals and in particular, nursing homes and extended care facilities in addressing the risks of liability exposure and the relative ease with which a plaintiff can file a claim of ordinary negligence without all the statutory hurdles of a professional negligence/medical malpractice claim.

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